Supreme

(1) 98 1354 NOV 20 1998

NO. _____ OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

In re FREDERICK R. CATCHPOLE,

Petitioner,

vs.

ALLAN F. ELMORE, A.L.J., ASBCA
ROGER P. WILLIAMS, ATTY., DEPT.OF TRANS.
JAMES A. BLACKWELL, III, ATTY., USAF
EDWIN R. BABBITT, ATTY., USAF
ARMED SERVICES BOARD OF CONTRACT APPEALS
UNITED STATES AIR FORCE,

Respondents.

Petition for a writ of mandamus
And declaratory judgement
In matters before the Armed Services
Board of Contract Appeals (ASBCA)
ASBCA case 46462

PETITION FOR EXTRAORDINARY WRIT

FREDERICK R. CATCHPOLE, pro se
2107 Coast Street, #N
Brunswick, Georgia 31520

912-262-9405

5 PP

THE SUBJECTS PRESENTED FOR ACTION

I. PETITION FOR WRIT OF MANDAMUS TO THE ARMED SERVICES BOARD OF CONTRACT APPEALS

Petitioner Frederick R. Catchpole asks for a writ ordering the ASBCA to comply with its own decision of 21 May 1998.

II. PETITION FOR A DECLARATORY JUDGMENT

The SUPREME COURT is asked to declare: (1) that the DUTCH MEMORANDUM is definitive and controlling in TPI related matters that are covered by the DUTCH MEMORANDUM; (2) that DUTCH found that the FAA did not have sufficient evidence to take the TPI certificate; (3) that the DUTCH MEMORANDUM proves the FAA grounding caused the USAF contract cancellation; (4) that the USAF must pay twenty eight million dollars for damages to TPI; (5) that sanctions shall

be assessed against government lawyers as asked herein; and (6) that under the laws cited in Supreme Court case 98-147, the USAF has an obligation to protect contract airlines while they operate on military bases.

PARTY AND CORPORATE INFORMATION

The Respondents are: (1) A.L.J. Allan F. Elmore, ASBCA; (2) Roger P. Williams, atty., Dept. of Transportation Inspector General's Office; (3) James A. Blackwell, III, USAF attorney; (4) Edwin R. Babbitt, attorney, USAF; (5) the Armed Services Board of Contract Appeals; and (6) the U.S. Air Force.

Petitioner Frederick Catchpole is president and majority shareholder of TPI INTERNATIONAL AIRWAYS, INC. (TPI). Mr. Catchpole (pro se) represents TPI in a shareholder derivative action under F.R.Civ.P. 23.1. He has been allowed by

the district courts and by the Eleventh Circuit in a number of related cases to so act for TPI. Mr. Catchpole has had two pro se cases decided by the Eleventh Circuit in his favor, and has lost none. This is a Rule 23.1 certification that: (1) Catchpole was the majority shareholder during all of the periods of the transactions that are involved here; (2) this action is not a collusive one to confer jurisdiction on a court that it would not otherwise have; and (3) the corporation does not have funds and has thus failed to enforce a right which it may properly assert. Further, the bankruptcy court has approved the assignment of TPI litigation rights to the Petitioner. The rules of the ARMED SERVICES BOARD OF CONTRACT APPEALS allow representation by an officer (48 C.F.R. Ch. 2, App. A, Rule 26). There are no parent or subsidiary companies.

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BASIS FOR JURISDICTION

Jurisdiction is under 28 U.S.C. Section 1651 as to the issuance of a writ of mandamus. 28 U.S.C. Sections 2201 and 2202 provide the jurisdiction for the Supreme Court to create a remedy in the form of a declaratory judgment, and any further relief after notice and hearing against any adverse parties whose rights have been determined by such judgment.

The Court of Appeals for the Federal Circuit would normally be the appellate court for matters from the ASBCA.

(NOTE: The Court of Appeals for the Federal Circuit previously refused to allow this petitioner to appeal pro se for TPI).

The Court of Appeals for the Federal Circuit heard an appeal of the of the ASBCA decision {before the DUTCH

MEMORANDUM had been released subsequent to appeal to the Eleventh Circuit}. The Federal Circuit declined to review TPI's evidence that a fraud has been committed upon the Court {based on the DUTCH MEMORANDUM and other evidence}.

Petitioner Catchpole further states that TPI's case Number 98-147, at the Supreme Court of the United States, is also affected by the fraud committed by government lawyers and personnel. 98-147 was denied Certiorary on October 5th 1998. The ASBCA has failed to provide a forum for TPI to enter the EVIDENCE that the government KEPT SECRET until now. The Government should not be allowed to cheat the system by withholding evidence and relying on the courts to deny relief on the basis of time. The Supreme Court should provide a remedy.

PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

Department of Defense regulations as set out by "48 C.F.R. Ch. 2, App. A, Subchapter I -- Agency Supplementary Regulations" apply in this case and the pertinent verbatim text is as follows:

Charter, par. 6: "Any member of the Board ... shall be authorized to hold hearings, examine witnesses, and receive evidence and argument for consideration and determination of the appeal ... "

ASBCA Rule 5: "Motions. (a) Any motion addressed to the jurisdiction of the Board shall be promptly filed. Hearing on the motion shall be afforded on application of either party. However, the Board may defer its decision on the motion pending hearing on both the merits and the motion. The Board shall have the right at any time and on its

own initiative to raise the issue of its jurisdiction to proceed with a particular case, and shall do so by an appropriate order, affording the parties an opportunity to be heard thereon".

REPRESENTATION: ASBCA Rule 26: "The Appellant. An individual may appear before the Board in person, a corporation by one of its officers; ..."

MOTION FOR RECONSIDERATION: Rule 29: "A motion for reconsideration may be filed by either party. It shall set forth specifically the grounds relied upon to sustain the motion. The motion shall be filed within 30 days from the date of the receipt of a copy of a decision of the Board by the party filing the motion.

TIME, COMPUTATION AND EXTENSIONS: Rule 33 (a): Where possible, procedural

actions should be taken in less time than the maximum time allowed. Where appropriate and justified, however, extentions of time will be granted. All requests for extentions of time shall be in writing."

STATEMENT OF THE CASE

TPI International Airways, Inc. was a cargo airline with a 1989-90 Air Force contract. TPI aircraft were sabotaged. The Air Force refused to investigate. It cancelled the contract. The FAA grounded TPI and bankruptcy followed.

Petitioner Catchpole was, and is, President of TPI, as well as the major shareholder. Catchpole contended that the contract was terminated with fraud on the part of government personnel and that the FAA never had sufficient cause to withdraw TPI's airline licenses and related governmental authorizations.

Petitioner Catchpole continued to pursue correction of the matter and prevailed upon United States Department of Transportation (DOT) personnel to institute a management review by the Office of the Inspector General (IG). That management review by DUTCH became

known as the DUTCH MEMORANDUM. That document revealed that the government's actions were improper and its' personnel had acted in violation of various laws.

The government's lawyers kept the DUTCH MEMORANDUM secret from 1993 until 1998 when it was released after an FOIA decision by the Court of Appeals for the Eleventh Circuit. Government lawyers had the DUTCH MEMORANDUM but continued to argue in various courts that their position was well founded and that they were in compliance with Rule 11 of the Federal Rules of Civil Procedure. They argued in the Court of Appeals for the Federal Circuit that the government's position was correct when they knew full well that the Inspector General's investigation (the DUTCH MEMORANDUM) proved otherwise.

The DUTCH MEMORANDUM was finally available to the Petitioner in 1998. He

prepared a motion for reconsideration to the Armed Services Board of Contract Appeals (ASBCA) citing the fraud upon that administrative court (board) that had occurred when government attorneys Babbitt and Williams sat before it and allowed (or possibly forced) a witness to lie about the contents of the DUTCH MEMORANDUM which had NOT been made available to TPI or to the ASBCA at the time of that hearing.

Judge ALLAN F. ELMORE of the Board of Contract Appeals received the motion from TPI and prepared the following response which is quoted verbatim:

"Dear Counsel:

On 11 May 1998, TPI filed a motion for reconsideration requesting the Board grant it the opportunity to submit a memorandum in support of its contention that the Board "reconsider its decision on the basis of fraud upon

the Court". The government filed a response opposing the motion. After consideration of the parties' positions, and over the government's objection, appellant's request is granted.

Appellant will, on or before 26 June 1998, file its memorandum at the Board. The Government, should it decide to do so, will file its response to Appellant's memorandum on or before 24 July 1998.

S/Allan F. Elmore
Administrative Judge
Armed Services Board
of Contract Appeals

Petitioner Catchpole responded to the ACCEPTANCE of the MOTION FOR RECONSIDERATION with documentation of the government fraud in the form of a copy of the government's own document - THE DUTCH MEMORANDUM, WHICH HAD JUST BEEN OBTAINED BY TPI AFTER OVER FOUR YEARS OF SEDULOUS EFFORT AND LITIGATION.

Petitioner provided the Board with substantial evidence that Air Force attorney Captain Lee H. Dayton had violated 18 U.S.C. Section 1512(b)(1).

Petitioner provided other evidence that strongly indicated that Air Force oils expert Robert L. Wright, Jr. (civ.) had committed perjury in his testimony before Judge Elmore.

Air Force attorney Edwin R. Babbitt replied by citing Rule 29 of the Board requiring reconsideration motions to be filed within 30 days. He made 25 pages of emotional argument and added a number of exhibits. The significant item was the citation of Rule 29.

ASBCA Judge Allan F. Elmore, with the concurrence of ASBCA Vice Chairman Mark N. Stempler and Acting Chairman Alan M. Spector dismissed the motion because it was not filed within 30 days as required by Rule 29 of the Board.

The DUTCH MEMORANDUM, a government document, is central to this case and it is therefore set out in the APPENDIX to allow the reader to see exactly what the government kept hidden from 1993 to 1998 while the TPI cases were being tried in various courts and before the ASBCA. SEE APPENDIX.

ARGUMENT

The ASBCA should be directed to decide the "motion for reconsideration" - as Judge Elmore agreed to do (see pages 3, 4 where his order is quoted).

48 C.F.R. Ch. 2, App. A sets out the Charter and Rules for the ASBCA. It states that any member of the Board shall be authorized to hold hearings. Judge Elmore is a member of the Board.

ASBCA Rule 5 requires any motion addressed to the Board shall be promptly filed and that the Board has the right

at any time and on its own initiative to raise the issue of its jurisdiction and to proceed with a particular case. Judge Elmore did just that, and proceeded with the TPI case.

ASBCA Rule 29 requires a motion to be filed within 30 days after the decision being appealed, BUT, Rule 33 provides that extentions of time may be granted where appropriate and justified. The TPI motion for reconsideration was inherently a request for an extention of time and Judge Elmore granted it when he ACCEPTED THE MOTION and allowed the parties to offer documents and argument.

The ASBCA then dismissed TPI's motion for reconsideration based on Rule 29 AFTER the ASBCA HAD ACCEPTED THAT SAME MOTION FOR RECONSIDERATION AND ASKED FOR ARGUMENT AND EVIDENCE.

Judge Elmore and the ASBCA did not have to accept the TPI motion for

reconsideration, but when it did a whole new set of criteria became applicable.

First, the agreement to accept the motion for reconsideration was clear and unequivocal. 5 C.F.R. Ch XVI, Subpart A, Section 2635.101, Basic obligation of public service, (b)(6) states "Employees shall not knowingly make unauthorized commitments or promises of any kind purporting to bind the Government". Judge Elmore made a promise that bound the Government to consider the information about the matters that TPI believed were fraud upon the Board. He did not have to agree with the TPI assessment - BUT - he does have to do what he said he would do. He must proceed with the reconsideration and make a decision beyond the decision of timeliness which he had already decided.

Judge Elmore said "over the Government's objection, the appellant's

request is granted". The appellant (TPI) had asked for RECONSIDERATION. He knew the rules and he knew the time element and he granted the motion for reconsideration which he had the authority to do. TPI raises the issue of promissory estoppel in which a promise reasonably expected to induce definite action by the promissee, and which does in fact induce such action is binding under promissory estoppel if injustice can be avoided only by enforcing the promise. Representation about future acts is not fraudulent merely because the future act does not happen, unless the promissor never intended to perform. Ruzicka v. Conde Nast Publications, 939 F.2d 578, n.5 and n.7, (8th Cir. 1991).

The legal effect of Judge Elmore's order granting TPI the requested reconsideration is purely a question of

law that is reviewable de novo on appeal. Estoppel principles are applicable in actions arising under federal law. Haas v. Darigold Dairy Products Co., 751 F.2d 1096, n. 1 and n. 6, (9th Cir. 1985).

"It is an immutable principle of jurisprudence that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case, documentary evidence and, even more important, testimony, must be disclosed to the individual so that he has an opportunity to show that it is untrue". "Where administrative action raises serious constitutional problems, the United States Supreme Court assumes that Congress or the President intends to afford those affected by the action the traditional safeguards of due process".

Greene v. McElroy, 360 U.S. 474, 3 L.Ed 2d 1377, 79 S.Ct 1400, n. 3, n. 11.

The Constitution imposes a duty on all three branches of government to uphold and support the Constitution. When the other branches of government fail in that duty, the judicial branch has the power and the obligation to redress the violation. As cited in Smith v. Meese, 821 F.2d 1484, (11th Cir. 1987) citing United States v. Johnson, 577 F.2d 1304, 1307 (5th Cir. 1978) and Marbury v. Madison, 5 U.S. (1 Cranch) at 165-66.

Judges Newman, Plager and Schall of the Federal Circuit decided the TPI appeal January 13, 1998 on issues BEFORE the DUTCH MEMORANDUM had become available through the Eleventh Circuit action. In another 1991 case, Judge Plager wrote: "As a general rule, trial courts are given wide discretion to

manage the course of a trial, and to direct the conduct of counsel. But this discretion is not without limits. We review the trial court's dismissal decision for an abuse of discretion [citations omitted]. An abuse of discretion may be found when (1) the court's decision is clearly unreasonable, arbitrary, or fanciful; (2) the decision is based on an erroneous conclusion of the law; (3) the court's findings are clearly erroneous; or (4) the record contains no evidence upon which the court rationally could have based its decision [citation omitted]. Hendler v. U.S., 953 F.2d 1364 (Fed. Cir. 1991). Judge Elmore's decision to accept the TPI motion and then to deny it under Rule 29 was unreasonable and arbitrary at the very least.

The case of the Government's action

in withholding the DUTCH MEMORANDUM; and the government lawyers misconduct in the concealment of evidence and subornation of perjury by DOT attorney Roger Williams; the violation of 18 U.S.C. Section 208 by AUSA Ruth Young and ; the perjury of government witnesses; and other acts against the interests of TPI, all warrant an immediate default judgement in favor of TPI. In M. Golodetz Export Corp. v. S/S Lake Anja, 751 F.2d 1103 (9th Cir. 1985) at n.1, 2, and 3, the District Court rendered a default judgement and assessed double costs and attorney fees where the defendant's misconduct relative to evidence and disobediance was so egregious. The TPI case here shows all of the evil above plus the fact that the Government's own DUTCH MEMORANDUM shows that:

(1) the FAA did not have sufficient evidence to ground TPI in 1990.

(2) the Air Force claimed that TPI lost the USAF contract because the FAA had grounded TPI.

(3) the FAA claimed to have grounded TPI because the USAF cancelled the contract.

The Government whizzed off on a flight of fancy and TPI got nailed because no one in government can see that the three statements above are mutually exclusive of each other. But that is almost beside the point because we have a motion that has been accepted and then cancelled in another flight of fancy. There would have been no reason for Judge Elmore to allow TPI and the government to file a brief if the motion was out of time. It just should not happen - but that's government. The United States Supreme

Court should step in and provide a rational solution.

There is an ultimate irony in this matter of the DUTCH MEMORANDUM. NOT ONE SINGLE WORD HAS BEEN OFFERED BY THE GOVERNMENT TO REFUTE OR EXPLAIN ANY PART OF THE DUTCH MEMORANDUM. Dutch found that the FAA did not have the evidence to ground TPI in 1990. Dutch found that the FAA had acted BECAUSE the Air Force cancelled the air cargo contract. The ASBCA findings depend entirely on the presumption that TPI could not fly and therefore could not perform the contract. The ASBCA should accept the evidence and rule on the contract dispute. But, with the fraud, the entire ASBCA procedure should be thrown out and the process begun again - or a default judgement granted in favor of TPI.

NOTE: There is a further issue not mentioned previously because it does not

bear directly on the question of the act of Judge Elmore. That further matter is that TPI aircraft were SABOTAGED while on USAF bases. The USAF failed to provide protection required by law. That matter was presented to the Supreme Court in case 98-147 which was denied certiorary on 5 October 1998. 98-147 is incorporated herein by reference for the purpose of supporting the request for sanctions against government attorneys.

THE ACTION REQUESTED

A WRIT OF MANDAMUS:

The Supreme Court is asked to issue a writ in the nature of mandamus directing Judge Elmore to perform the duty for TPI that he accepted on behalf of the United States. Judge Elmore should be required to rule on the motion for reconsideration considering the evidence which includes the DUTCH MEMORANDUM.

DECLARATORY JUDGMENTS:

The Supreme Court is asked to issue a declaratory judgment that Judge Elmore is required to rule on the motion for reconsideration considering the evidence which includes the DUTCH MEMORANDUM. The Court is further asked to include an enforcing injunction.

The Supreme Court is asked to issue a declaratory judgement that the DUTCH MEMORANDUM, a government document unchallenged by the government as to its accuracy, is the definitive position of the Government as to TPI and the matters that are spoken to in that document.

The Supreme Court is asked to further declare that the DUTCH MEMORANDUM reflects that the FAA did not have sufficient evidence to take the TPI certificate.

The Supreme Court is asked to further declare that the DUTCH

MEMORANDUM proves that the FAA grounding of the airline was caused by the USAF contract cancellation which is therefore proof that the contract termination was without reasonable cause. The USAF therefore is required to pay TPI the amount of twenty eight million dollars for damages to TPI.

The Supreme Court is asked to declare that a PERSONAL sanction in the amount of one hundred thousand dollars shall be assessed against government attorneys as follows:

(1) Department of Transportation attorney Roger Williams for sitting beside a government witness before the ASBCA and allowing and/or encouraging him to commit perjury concerning the contents of the DUTCH MEMORANDUM which attorney Williams was entirely familiar with.

(2) USAF attorney Edwin R. Babbitt and

Air Force attorney Major James A. Blackwell, III. These two lawyers represented the Air Force in the ASBCA hearing with full knowledge of the DUTCH MEMORANDUM and allowed a Civil Service employee to commit perjury.

A declaratory judgment is asked with reference to the details of Supreme Court Case number 98-147 which is hereby incorporated by reference. 98-147 shows that the USAF had a legal obligation to protect TPI from sabotage. (Note: the government attorney told the Federal Circuit that he "thought" the government had no such responsibility). The Court is asked to declare that the USAF, on the basis of the laws cited in 98-147, DOES have a responsibility to protect a contract airline operating on military bases (unless the Government cares to argue otherwise).

SUMMARY

Petitioner Frederick R. Catchpole asks the Supreme Court for the writ of mandamus and for the declaratory judgments specified above. Where a court grants a declaratory judgment, damages may be awarded. Danko v. Shell Oil Co., D.C.N.Y.1953, 53 F.Supp 886.

As to the requests for sanctions against the government attorneys, it is noted that any official immunity of federal agents has no application to a suit for declaratory relief. Rowley v. McMillan, D.C.N.C. 1974, 502 F.2d 1326.

A suit will lie against a public officer for acting beyond a statutory authority, and a declaratory judgment, together with an enforcing injunction, furnishes a proper device to test the scope of his authority. King v. U.S., 1968, 390 F.2d 894, 182 Ct.Cl. 631,

reversed on other grounds 89 S.Ct. 1501, 395 U.S. 1, 23 L.Ed.2d 52.

On appeal, if the Armed Services Board of Contract Appeals fails to make a relevant finding of fact which is established by undisputed evidence, the Court may make a supplemental finding. U.S. v. Hamilton Enterprises, Inc., 711 F.2d 1038 (Fed. Cir. 1983).

The Supreme Court will note that the mischief of the attorneys cited and the unwarranted withholding of the DUTCH MEMORANDUM and/or the evidence that it reveals of the wrongs to TPI, provided the opportunity for fraud upon the Armed Services Board of Contract Appeals, the Bankruptcy Court, the District Courts, the Eleventh Circuit Court of Appeals, The Federal Circuit Court of Appeals and the United States Supreme Court. The Georgia State Bar Rules include reference to Keen v.

State, 164 Ga. App. 81, 296 S.E.2d 91 (1982) and states that: "because it interferes with the proper administration of justice, a lawyer should not suppress evidence that he or his client has a legal obligation to produce". Citing Johnson v. State, 258 Ga. 506, 371 S.E.2d 396 (1988), the Bar Rules state "A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair ... A lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.

SIGNATURE OF PETITIONER

FREDERICK R. CATCHPOLE, pro se

President and majority shareholder
acting under F.R.Civ.P. 23.1 for:

TPI International Airways, Inc.

2107 Coast Street, #N
Brunswick, Georgia 31520

912-262-9405

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ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of-

TPI International Airways, Inc.

Under Contract No. F11626-90-D-0031

ASBCA No. 46462

Appearance for the Appellant:

Alan David Tucker, Esq., Brunswick, Ga.

Appearance for the Government:

Col. John M. Abbott, USAF, Chief Trial Attorney.

Edwin R. Babbitt, Esq., Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE ELMORE
ON APPELLANT'S MOTION FOR RECONSIDERATION

TPI International Airways, Inc. (TPI or appellant) has filed a second motion and memorandum in support of the motion, for reconsideration of the Board's 7 June 1996 decision (96-2 BCA section 28,373; Recon. den. 96-2 BCA section 28,602; affd., 135 F.3d 776 (Fed.Cir.1998)(table); cert.denied (U.S. Oct. 5, 1998)(No.98-147). The Government has filed a reply in opposition. Familiarity with prior decisions are presumed.

TPI contends that the Board's de novo determination that the Air Force was justified in terminating TPI's

contract because TPI "was suspended from flying by the FAA [Federal Aviation Administration] and subsequently by the CARB [DoD Commercial Airlift Review Board and] could not perform the contract" should be set aside "for fraud upon the court[sic]. " TPI argues the exhibits to its memorandum 1 "gives a different version of events than that which the Board was privy to in the decision

(end of page 1 of decision; following notes are on page 1, at bottom):

1
Ex.A "Dutch Memorandum," dated 3 July 1993 and authored by Mr. Dennis E. Dutch, Director, Office of Investigations, Department of Transportation's Inspector General's Office;
Ex.B: unsigned affidavit allegedly provided by Captain Lee Dayton to Mr. David Roman, President, Lab One;
Ex.C: unsworn signed statement from Mr. Roman;
Ex.D: letter from Mr. Malte Lukas, President, Spectro, Inc.;
Ex.E: affidavit from Mr. Gerald Healey, an employee of United Technologies Corporation.

(page 2 of ASBCA decision continues):

making process"; that the memorandum "gives credence to the probability that the government agencies, including the Air Force, employed a systematic pattern of subterfuge and intimidation to ground TPI"; that "Mr. Wright's testimony about the capability of Lab One equipment was patently incorrect"; and that a "recent

affidavit from Lab One ... shows that Captain Dayton apparently violated the federal obstruction of justice law in his contacts with them."

The Government, in opposition to appellant's reconsideration motion, argues the motion is untimely; that there is insufficient legal support for the motion; and the Board's decision was supported by a preponderance of the evidence.

Board Rule 29. Motion for Reconsideration requires "the motion to be filed within 30 days from the date of the receipt of a copy of the decision of the Board by the party filing the motion". Appellant filed a motion for reconsideration and received a decision thereon. Our rules do not provide for a second motion for reconsideration from the same decision. Moreover, the decision was rendered over two years ago and has been affirmed by the Federal Circuit. The Motion For Reconsideration is dismissed.

Although the Board has never adopted the Federal Rules of Civil Procedure (Fed.R.Civ.P.), we do use the Federal Rules as a guideline. Rule 60(b) does provide for relief from final judgement, order or proceeding on motion made "not more than one year after the judgment, order or proceeding was entered or taken" for newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b), or for "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct

of an adverse party. " Under Rule 60(b) appellant's motion is untimely.

Were the Board to accept appellant's second reconsideration motion, which we do not do, the motion would be denied. This Board's original decision was predicated on TPI's suspension from performing airlift transportation services by CARB and the voluntary surrender of its FAA issued air carrier operating certificate (findings 3, 4, 43, 47) 2. TPI did not appeal the determination of the CARB (finding 44). In this reconsideration motion, as well as all of its prior submittals, appellant has not cited, and we are unaware of, any authority which gives us the authority to review the determination made by the CARB.

(note at bottom of page 2 as follows:)

2 Referenced findings of fact are found in the Board's 7 June 1996 decision.

(page 3 of the Opinion is as follows:)

The motion is dismissed.

Dated: 13 October 1998

S/Allan F. Elmore, Administrative Judge

I concur:

Mark N. Stempler, Administrative Judge
Vice Chairman, ASBCA

I concur:

Alan M. Spector, Administrative Judge
Acting Chairman, ASBCA

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA 46462, Appeal of TPI International Airways, Inc., rendered in conformance with the Board's Charter.

S/Donald D. Mills
For/ Edward S. Adamkewicz
Recorder, Armed Services Board of
Contract Appeals

COURT OF APPEALS FOR THE FEDERAL CIRCUIT

TPI Int'l. Airways, Inc., Appellant

v.

Department of the Air Force, Appellee

Case Number 97-1192

The Clerk appended the following denial at the bottom of TPI's motion to set aside judgment due to fraud.

*****

DENIED. WE DENY TPI'S MOTION TO SET ASIDE THE JUDGMENT. THIS DOES NOT PRECLUDE ASBCA FROM REOPENING THE MATTER AS IT SEES FIT. FOR THE COURT. BY:

S/JAN HORBALY, CLERK

DATE JUN 22 1998

FILED

U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

JUN 22 1998

JAN HORBALY
CLERK

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RE: ASBCA No. 46462
Appeal of TPI International Airways, Inc.
Under Contract No. F11626-90-D-0031

Dear Counsel:

On 11 May 1998, TPI filed a motion for reconsideration requesting the Board grant it the opportunity to submit a memorandum in support of its contention that the Board "reconsider its decision on the basis of fraud upon the Court."

The Government filed a response opposing the motion. After consideration of the parties' positions, and over the Government's objection, appellant's request is granted.

Appellant will, on or before 26 June 1998, file its memorandum at the Board. The Government, should it decide to do so, will file its response to appellant's memorandum on or before 24 July 1998.

S/Allan F. Elmore
Allan F. Elmore
Administrative Judge
Armed Services Board of Contract Appeals

MEMORANDUM

U.S. Department of Transportation
Office of the Secretary of Transportation
Office of Inspector General

Subject: INFORMATION: Review of Report of Investigation, TPI International Airways, Inc.

From: Dennis E. Dutch, Director, Office of Special Investigations [S/D.E.Dutch]

To: Patricia J. Thompson, Deputy Assistant Inspector General for Investigations

I have reviewed the Report of Investigation (ROI) concerning JRI-4's investigation regarding allegations against FAA officials who improperly threatened to take certificate action against TPI International Airways, Inc., on August 28, 1990. I have noted a number of failures in the ROI to resolve the allegations. They are:

The gravamen of the allegations concern whether the FAA had sufficient evidence on August 28, 1990, to force TPI to surrender their operating specifications. The ROI, in my opinion, failed to prove whether or not the FAA had sufficient evidence.

The facts of the matter are that the FAA and TPI officials had a meeting on August 28, 1990, where the FAA told TPI that it had sufficient evidence to close TPI, and that if TPI did not surrender its operating specifications, the FAA would obtain a court order to close them. The reasons used for this action, according to the FAA, was that the military had revoked TPI's contract, an incident in Aruba where engine parts fell off a plane, and records discrepancies involving training and maintenance procedures. TPI President

Fred Catchpole subsequently surrendered TPI's certificate, figuring that the FAA would have to later specifically enumerate what TPI did that was so wrong for the FAA to threaten certificate action. The FAA has never specifically told TPI the reasons for their action. Since then, Catchpole has vehemently argued that the FAA's actions were not supported by the facts, in some instances, the FAA lied and/or covered up the facts, and the OIG's investigation failed to find these FAA discrepancies.

The failures of the ROI, in my opinion, are as follows:

1. The ROI failed to note the FAA's version of what happened at the August 28 meeting (attachment 24) differs from Catchpole's records (attachment 1) and the records of his assistant (attachment

25).

Both TPI officials made reports as to what occurred at the meeting, and neither state that the FAA used the military and Aruba events as reasons for the revocation of TPI's certificate. The ROI also failed to note who from the FAA wrote their memo, when it was written, and the date it was written (it is undated). Also, according to Catchpole, in depositions, nobody from the FAA will take credit for writing the memo of the meeting, and all attendees deny taking notes.

2. Paragraph 2 of the ROI alleges significant FAA violations found during an in-depth inspection by the Miami FSDO in 1989 and 1990 against TPI which contributed to FAA's determination on August 28, 1990 that TPI was unqualified to hold a certificate.

Shortly after the inspection, TPI moved from Florida to Georgia. For the move to occur, TPI, according to FAA regulations, must clear all violations. The move occurred, so TPI must have cleared its outstanding violations. The ROI failed to note this.

The last section of the ROI mentions that when TPI moved, all discrepancies were cleared, but the underlying violations were still outstanding at the regional office. This does not make sense. The ROI failed to resolve this inconsistancy.

It was later learned by Catchpole that the average number of violations found for a carrier the size of TPI is 147. The number of violations found at TPI was 85. The ROI failed to disclose this.

3. The ROI failed to interview FAA and

TPI personnel that the FAA was "out to get TPI through its pilots."

The FAA revoked the testing authority of pilots Headlee and Pulley. In the letters of revocation, one of the reasons used by the FAA to revoke their authority was a history of violations by the two individuals.

In fact, Headlee and Pulley had never been individually violated. TPI was once violated, which in turn, caused the revocation of all of TPI's pilots testing licenses, including those of Headlee and Pulley but neither pilot was ever violated because of individual misconduct. The ROI failed to note this fact.

Also, it appears that FAA inspector Brinker, and other FAA inspectors from Atlanta may have been pre-disposed to

violate TPI and/or its pilots, and the ROI did not address this issue. FAA inspector Bruce tested Headlee, and after the test, did not inform Headlee that he had failed. Subsequently, TPI Operations Director Jack Orr received a phone call in the AM of July 31, 1990, from Brinker who informed Orr that Headlee had failed. In the PM of the same day, Bruce telephoned Headlee for some additional information that Bruce needed to finish his report on the test, and at that time stated that it was not true that Headlee had failed. Fifteen minutes later, Brinker phoned Orr to tell him that Headlee had failed.

Because Headlee was not qualified to give exams, Pulley was revoked because there was nobody to give him a timely exam.

The ROI failed to interview Orr, Headlee

and Pulley.

Other events showing pre-disposition were also not addressed. They are:

FAA inspector Glenn allegedly told Headlee that "we are out to get the company through the pilots." This was never addressed in the ROI.

Bruce allegedly told a client of TPI at Tinker Air Force Base that they were under orders to put "the final nails in TPI's coffin." In his interview, Bruce admitted to making the statement, but he stated the statement was used out of context. The "under Orders" was never addressed in the ROI.

4. The ROI failed to properly address why the FAA changed its enforcement attitude after August 7, 1990.

The interview with Berry, the regional flight standards manager, was poor (attachment 6). In his interview, Berry, stated that TPI had serious problems, but the FAA would work with TPI to get it into compliance in a spirit of cooperation. What serious problems? It was not developed in the ROI.

5. FAA inspector Brinker reversed himself to the detriment of TPI, which the ROI failed to resolve.

Other than the military and Aruba incidents, the reasons the FAA used against TPI to attempt to close them down were poor manuals and outdated teaching materials. Catchpole states that months before, Brinker, the main FAA inspector responsible for TPI, gave them until 1990 to get into compliance, but on August 28, this was used against him. The same applies

for teaching, using certain operating specifications. The method used by TPI had been approved by Brinker, but he later reversed himself in front of FAA management.

6. The FAA's attitude changed after August 7, 1990. The ROI does not develop why this occurred.

Berry's interview mentions that he does not recall if he received pressure from above as a result of the cancellation of TPI's military contract. Again, the interview did not follow this lead sufficiently.

Factually, the military did not cancel TPI's contract until August 29, 1990, which is after the August 28, 1990 meeting with Catchpole. If oral communications occurred, which caused the FAA to take action, again, the ROI

failed to develop this.

7. The FAA memorandum of the August 28 meeting notes that the two main reasons for action against TPI was the cancellation of the military contract, and the recent incident in Aruba of one of TPI's planes.

As previously stated, the military contract was not cancelled until August 29.

Concerning the Aruba incident, the involved plane had engine problems which lead to the loss of some of the engine parts. The ROI failed to note that the engine had recently been repaired, and the repair station that did the repairs, when asked for the repair records, produced typed copies, stating the originals had been destroyed. This is particularly disturbing, especially

considering the OIG's knowledge of the suspected unapproved parts problem, and that engine repair stations are significant contributors to the problem, using bogus parts internally in the engines, and then certifying them as meeting FAA approved standards.

The ROI noted that the engine had been involved in a previous crash, and that TPI owned the plane at the time. The ROI infers that Catchpole knew this fact. In fact, Catchpole was unaware of this fact, having come into TPI in 1989. The engine was involved in a crash in 1986.

8. The ROI failed to examine the FAA's records as of August 28, 1990, to see if they, in fact, possessed the information necessary to revoke TPI's certificate.

The records examination should have also attempted to follow what contacts were

made with the military which lead the FAA to to change their attitude against TPI.

9. Inspector Brinker, in his affidavit, stated that the reason why TPI was asked to surrender its certificate was its inability to maintain its aircraft. The interview of Brinker failed to develop what specifics Brinker was referring to. Brinker's entire affidavit deals with training records discrepancies, not maintenance problems.

In short, the FAA's attitiude towards TPI changed. They were finding violations against TPI, but there did not appear to be an attitude that the violations were serious enough to merit revocation of TPI's certificate. Something changed the FAA's attitude, and I believe it was the military's action. Suddenly, the FAA started to use

the violations it had previously found against TPI, and the ROI failed to determine why.

The ROI never specifically developed the FAA's contact with the military; it never interviewed witnesses who allegedly had information that the FAA was "out to get TPI"; it failed to notice differences in the FAA's version of the August 28 meeting with TPI official's versions; who authored the FAA report and the date it was written; it failed to address the alleged change in actions by Inspector Brinker; it took credence in the typed copies of the repair of the engine parts; and it failed to examine FAA records to determine if the files, as of August 28, supported the charges against TPI.

There also appears to be new evidence which appears to support Catchpole's

position. It is as follows:

1. In a deposition taken after the revocation of the certificate, the FAA Regional Counsel admitted that at the time of the August 28 meeting, the normal procedure for the FAA to take regarding the number of violations alleged against TPI would be civil penalties, not certificate revocation.

2. FAA personnel have admitted to Catchpole that the FAA was wrong on August 28 when it asked for TPI's certificate.

3. Catchpole seems able to defend maintenance discrepancies found by the FAA. The ROI did not resolve the FAA;s position with Catchpole's explanations.

I believe that the ROI did not properly address the major important issues

raised by Catchpole, and there are enough unanswered questions, especially considering the new information recently alleged, to have JRI-4 specifically address the questions raised by this review. Once those questions have been answered, then a better determination might be able to be made regarding the facts.

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NOTE: This is the end of the DUTCH MEMORANDUM. The underlined parts of the DUTCH MEMORANDUM are exactly as found in the original document as written by DENNIS E. DUTCH, Director, Office of Special Investigations, Office of the Inspector General, Office of the Secretary, Department of Transportation. Mr. DUTCH personally performed the review that resulted in his memorandum. Dutch's signature was by his name on page 1 of the memorandum.